BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SCOTT M. ALCALA	)	
Claimant	)	
	)	
VS.	)	
	)	
LUXURY LAWN & LANDSCAPE, INC.	)	
Respondent	)	Docket No. **1,036,416**
	)	
AND	)	
	)	
FIRSTCOMP INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the February 4, 2009 Award by Administrative Law Judge Brad E. Avery. The Board heard oral argument on June 3, 2009.

APPEARANCES

Bruce A. Brumley of Topeka, Kansas, appeared for the claimant. Jennifer L. Arnett of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

It is undisputed claimant suffered a work-related injury to his back that required surgery. After his surgery he was referred to Dr. Sushmita Veloor for physical rehabilitation and work hardening. Dr. Veloor ultimately released claimant to regular duty work without any restrictions. But Dr. Veloor also reviewed lists, prepared by the vocational experts, of the tasks performed by claimant in the 15-year period before his injury and concluded claimant has a task loss.

The Administrative Law Judge (ALJ) noted that although Dr. Veloor released claimant without restrictions, she nonetheless utilized a functional capacity evaluation of

claimant and determined he suffered a task loss. Dr. C. Reiff Brown assigned claimant restrictions and also determined that he suffered a task loss. Consequently, the ALJ found claimant sustained a 34.13 percent work disability based upon a 33 percent wage loss and a 35.25 task loss.

Respondent requests review of the nature and extent of disability and argues claimant should be limited to his 10 percent functional impairment because he was released at maximum medical improvement without any permanent physical restrictions.

Claimant argues he is entitled to a 40.5 percent work disability based upon a 33 percent wage loss and a 48 percent task loss (the average of Dr. Brown's task loss opinions using both experts' task lists).

The sole issue for Board determination is the nature and extent of disability, specifically, whether claimant is entitled to a work disability or should be limited to his functional impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was hired as a landscape foreman and machine operator for respondent. On June 4, 2007, claimant testified he was twisting and turning when he injured his lower back. He sought medical treatment on June 18, 2007. Dr. David Fritz performed surgery on claimant's back and he was taken off work for approximately 28 weeks. After surgery, claimant received some rehabilitative treatment by Dr. Veloor. Claimant was released without restrictions to return to work on January 2, 2008, by Dr. Veloor.

Claimant testified:

> Q. Okay. Once she released you and took -- and you went back to your employer, did you -- well, first of all, let me ask you. Did you go back to your employer?
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> A. I attempted to, yes.
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> Q. Did you take the note saying there was no restrictions?
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> A. Yes, I did.
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> Q. And what did the employer tell you?

A. Told me my job was filled and I was no longer needed.[1]

On January 4, 2008, claimant met with respondent's owner, John Moser, to discuss his job and was advised that he was not needed. So, on January 7, 2008, claimant contacted Mr. Moser again regarding any job openings with respondent. Claimant received a letter dated January 14, 2008, referring him to the Kansas Job Links for position openings with respondent. Claimant testified there were not any job openings available so he filed for unemployment benefits. At the time of the regular hearing, claimant was still unemployed and receiving benefits. He testified he had applied for 65 jobs.[2]

Claimant testified that he did not have any problems with his back before the accident but after the accident he has aches and pains depending on his activities.

At the request of claimant's attorney, Dr. C. Reiff Brown, examined claimant on February 14, 2008, for an independent medical examination. The doctor performed an examination, reviewed claimant's medical records and diagnosed claimant as having preexisting degenerative problem at L5-S1 and a herniation of the L5-S1 disk with left leg pain. At the time of the examination, Dr. Brown opined claimant had reached maximum medical improvement. Based on the AMA *Guides*[3], Dr. Brown determined claimant's rating to be 10 percent to the body as a whole due to the placement in DRE Lumbosacral Category III with radiculopathy. The doctor also found claimant had an additional 5 percent impairment of the left leg for his sensory deficit and another 5 percent due to his motor nerve dysfunction. These ratings combine for a total 14 percent whole body impairment. Dr. Brown imposed restrictions that claimant avoid lifting above 40 pounds occasionally, 20 pounds frequently and all lifting should be done utilizing proper body mechanics. He should also avoid frequent flexion and rotation of the lumbar spine.

Dr. Brown reviewed the list of claimant's former work tasks prepared by Mr. Richard Santner and concluded claimant could no longer perform 11 of the 18 tasks. The doctor also reviewed the list of claimant's former work tasks created by Mr. Terry Cordray and opined that claimant could no longer perform 8 out of the 23 tasks.

Dr. Sushmita Veloor, a board certified physiatrist, examined and evaluated the claimant on October 30, 2007. The doctor recommended work conditioning program and also placed claimant on temporary restrictions of no lifting more than 30 to 35 pounds. Claimant was seen again on November 29, 2007, wherein he was ordered to have EMG nerve conduction study. On January 2, 2008, claimant was released to full-duty work after

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[1] R.H. Trans. at 7-8.

[2] *Id*., Cl. Ex. 2 & 3.

[3] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

discussing the EMG results with Dr. Veloor. The EMG revealed no abnormalities or evidence of any acute radiculopathy. The last visit claimant had with Dr. Veloor was January 18, 2008. Dr. Veloor determined that claimant had reached maximum medical improvement and recommended that he continue with his home exercise program. Claimant was released to return to work without restrictions. Dr. Veloor rated claimant's impairment using the AMA *Guides*, DRE Lumbosacral Category III, and found claimant has a 10 percent whole person impairment.

Dr. Veloor reviewed the list of claimant's former work tasks created by Mr. Terry Cordray and opined that claimant could no longer perform 4 out of the 23 tasks. The doctor also reviewed the list of claimant's former work tasks created by Mr. Richard Santner and opined that claimant could no longer perform 5 out of the 18 tasks.

Richard Santner, a vocational rehabilitation counselor, conducted a personal interview with claimant on February 5, 2008, at the request of claimant's attorney. He prepared a task list of 18 nonduplicative tasks claimant performed in the 15-year period before his injury. At the time of the interview, the claimant was working full time, 40 hours a week, for a different employer earning $12 an hour. Mr. Santner opined claimant was capable of earning $480 a week which is a 33 percent wage loss.

Terry Cordray, a vocational rehabilitation counselor, conducted a personal interview with claimant on May 23, 2008, at the request of respondent's attorney. He prepared a task list of 23 nonduplicative tasks claimant performed in the 15-year period before his injury. Mr. Cordray further opined claimant has the capability of earning $12 to $13 an hour. Mr. Cordray concluded claimant was capable of earning $480 to $520 per week.

The respondent argues that claimant should be limited to his functional impairment because Dr. Veloor released him to regular duties without permanent physical restrictions. However, this argument is undermined by the fact that Dr. Veloor later relied upon a functional capacity evaluation and determined claimant had lost the ability to perform certain tasks. Had Dr. Veloor testified that claimant had no task loss because he had no restrictions, there would be some merit to respondent's argument. But in this case, Dr. Veloor clearly determined that the claimant had suffered a task loss as a result of his work-related injury. Moreover, Dr. Brown also assigned permanent restrictions and determined claimant had suffered a task loss. Consequently, the Board agrees with the ALJ's determination that claimant is entitled to a work disability analysis.

Because claimant's injuries comprise more than a "scheduled" injury as listed in K.S.A.2007 Supp. 44-510d, his entitlement to permanent disability benefits is governed by K.S.A. 2007 Supp. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent

> of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[4] and *Copeland*.[5] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a), that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual post-injury wages being earned when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.[6]

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[7]

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[4] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[5] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[6] An analysis of a worker's good faith effort to find appropriate employment after recovering from the work injury for purposes of the wage loss prong of K.S.A. 44-510e may no longer be applicable as our Supreme Court has recently said that statutes must be interpreted strictly and nothing should be read into the language of a statute as was done in *Foulk* and *Copeland.* See *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *rev. denied* (May 8, 2007); and *Graham v. Dokter*, 284 Kan. 547, 161 P.3d 695 (2007).

[7] *Id.* at 320.

But even more recently, in *Graham*[8], the Kansas Supreme Court said:

> When a statute is plain and unambiguous, we must give effect to its express language, rather than determine what the law should or should not be. We will not speculate on legislative intent and will not read the statue to add something not readily found in it. If the statute's language is clear, there is no need to resort to statutory construction. *Steffes v. City of Lawrence*, 284 Kan. 380, Syl. 2, 160 P.3d 843 (2007); *Perry v. Board of Franklin County Comm'rs*, 281 Kan. 801, 809, 132 P.3d 1279 (2006).
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> The Court of Appeals erred in overlooking the import of this plain language in the statue, instead attempting to divine legislative intent from a review of legislative history. See *Graham I*, 36 Kan. App. 2d at 525. In our view, that step is unnecessary. Statutory interpretation begins with the language selected by the legislature. If that language is clear, if it is unambiguous, then statutory interpretation ends there as well. See *Perry*, 281 Kan. at 809.
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> The panel began its discussion by equating the statute's use of the phrase "engaging in work" to "able to earn." K.S.A. 44-510e(a) prohibits permanent partial general disability compensation if an employee is "engaging in work" for wages equal to 90 percent or more of the average preinjury wage. The panel said the record was insufficient to support claimant's contention that he was "unable to earn" that amount. We see a distinction with impact between the actual "engaging in work" of the statue and the theoretical "able to earn" of the Court of Appeals. Claimant may be theoretically able to earn more, but substantial evidence supports the Board's determination that his actual pain prevents the theory from becoming a reality.
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> The panel also advanced a policy rationale for its decision--its desire to avoid manipulation of a system that permitted a work disability award "based purely on reported pain." *Graham I,* 36 Kan. App.2d at 527. It wanted to avoid a situation where a worker could control "his or her workweek to assure that, *on average*, the postinjury weekly wage will not exceed the 90 percent of preinjury wage that would make the worker ineligible for the award, even through [sic] the worker demonstrates a clear ability to earn the 90 percent any time desired." 36 Kan. App. 2d at 527. There are at least three reasons why this rationale was inappropriate. First, public policy is usually the arena of the legislative branch. Second, even if the judiciary was charged with setting public policy, other mechanisms exist for

[8] *Graham v. Dokter,* 284 Kan. 547, 161 P.3d 695 (2007).

> detection of fraudulent workers compensation claims. See K.S.A. 2006 Supp. 44-501; K.S.A. 44-510e(a); K.S.A. 2006 Supp. 44-551; *Lowmaster v. Modine Mfg. Co.*, 25 Kan. App. 2d 215, 219, 962 P.2d 1100, *rev. denied* 265 Kan. 885 (1998). And, third, there is absolutely no evidence in the record that this particular claimant was "faking his pain or lack of ability to work full time."

In *Graham*, the Supreme Court also said that there was no evidence Graham was attempting to manipulate the workers compensation system. Thus, the Supreme Court did not reach the issue of whether the literal language of K.S.A. 44-510e(a) would be applied to allow an award of a work disability under those facts. Nevertheless, the *Graham* case may signal a willingness on the part of the Supreme Court to revisit those cases where the judiciary decided public policy required the court to depart from the plain language in the statute. The Board, however, will continue to follow the *Foulk* and *Copeland* line of cases until an appellate court decides that K.S.A. 44-510e(a) does not require the fact finder to impute a wage based upon a claimant's wage earning ability whenever a claimant fails to prove he or she made a good faith effort to find appropriate employment post-injury.

After claimant was released to return to work he attempted to go back to his job with respondent but was told that his job had been filled. Claimant did not know if he could still perform his job for respondent as he was not given the opportunity to try. He then began a job search that met the eligibility requirements for unemployment compensation benefits. Although some of the jobs that he applied for were considered medium to heavy labor, the claimant noted that although he did not know if he could perform the jobs he needed work and was willing to attempt the jobs. Finally, claimant obtained work with Ehrhart Excavating making $480 per week. The job is within his restrictions and described by both vocational experts as an easy job.

It is not disputed that claimant made a good faith effort to find appropriate employment. The ALJ further compared the claimant's actual post-injury wage with his pre-injury wage which resulted in a 33 percent wage loss. Finally, the ALJ averaged Drs. Veloor and Brown's task loss opinions using both vocational experts for a 35.25 percent task loss. Averaging the task loss and wage loss results in a 34.13 percent work disability.

Although not mentioned in the Award, the claimant would be entitled to a 100 percent wage loss from the time he was released to return to work until he obtained employment with Ehrhart Excavating as he engaged in a good faith effort to find employment. This was a time period of approximately seven months. The work disability formula requires that the percentage of wage loss and task loss be averaged to arrive at the work disability. For this time period claimant would have a 68 percent work disability. But whenever there is no gap in disability benefits, the total disability compensation award generally is the same as if the award were calculated using only the last percentage of permanent impairment. There would be no difference in compensation had this award been calculated using the changed percentage of wage loss and resultant work disabilities. Because of this, the Board sometimes will only show the abbreviated calculation, but with

an explanation that although the percentage of disability changed it makes no difference in the award. That is the case here. Consequently, the ALJ's Award calculating benefits for a 34.13 percent work disability is affirmed.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Brad E. Avery dated February 4, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Bruce A. Brumley, Attorney for Claimant
Jennifer L. Arnett, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge